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No. 90-6113

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

RANDALL D. WHITE,
Petitioner,

v.

ILLINOIS,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fourth Judicial District

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

THE CONFRONTATION CLAUSE REQUIRES THAT THE HEARSAY STATEMENTS OF A NON-TESTIFYING COMPLAINING WITNESS IN A CHILD ABUSE PROSECUTION SHOULD BE ADMITTED ONLY UPON A CASE-SPECIFIC FINDING OF NECESSITY: THE TRIAL COURT SHOULD HEAR EVIDENCE AND DETERMINE IF THE CHILD IS UNAVAILABLE TO TESTIFY.

Respondent argues that the prosecution should be allowed to substitute admissible hearsay for the testimony of the complaining witness in child abuse prosecutions, reasoning that such a procedure would spare the child witness the trauma of testifying. However, while Respondent's argument correctly identifies the state's interest in the welfare of the child witness, it overlooks the defendant's countervailing Sixth Amendment right to the adversarial testing of the prosecution's evidence before the trier of fact.

These competing interests were recently addressed in *Maryland v. Craig*, 497 U.S. ——, 111 L.Ed.2d 666 (1990), where the Supreme Court enunciated a rule of necessity. By requiring the prosecution to either produce the child witness or demonstrate her unavailability, the rule of necessity properly balances the state's interest in the welfare of the child witness with the defendant's constitutional right to confront his accuser, thereby "preserv[ing] the adversary nature of the trial." *Maryland v. Craig*, 111 L.Ed.2d at 686. An examination of Respondent's argument fails to reveal any convincing reason why the rule of necessity should not be applied here.

A. Respondent Mistakes the Confrontation Clause for a Rule of Evidence.

Respondent likens the Confrontation Clause to a "better evidence rule" and reasons that admissible hearsay satisfies the confrontation right because such evidence is presumptively reliable and has independent probative value. Pursuant to this evidentiary analysis, Respondent concludes that if an out-of-court statement falls within an exception to the hearsay rule it has sufficient reliability to satisfy Confrontation Clause requirements, regardless of the defendant's inability to cross-examine the absent declarant.

Such reasoning, however, mistakes the Confrontation Clause for the hearsay rule. While reliability is the primary justification for exempting an out-of-court statement from the hearsay rule (*Chambers v. Mississippi*, 410 U.S. 284, 298 (1978)), the core purpose of the Confrontation Clause is to assure the accused the opportunity to confront his accuser. Notwithstanding Respondent's attempt to redefine the confrontation right in evidentiary terms, the language of the Sixth Amendment speaks for itself:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .
>
> U.S. Const., amend. VI.

Accordingly, this Court recently reiterated that the Confrontation Clause contains not only a reliability requirement, but an unavailability rule as well:

> [The] confrontation clause "operates in two separate ways to restrict the range of admissible hearsay.
>
> First, in conformance with the Framers' preference for face-to-face accusation the Sixth Amendment establishes a rule of necessity. *In the unusual case . . ., the prosecution must either produce or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant.*"
>
> Second, once a witness is shown to be unavailable, "his statement is admissible only if it bears adequate 'indicia of reliability'. Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception . . ."
>
> *Idaho v. Wright*, 111 L.Ed.2d at 651-52 quoting *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (citations omitted; emphasis added).

Although the foregoing language clearly states that the rule of necessity applies "*in the usual case*", Respondent argues that the unavailability requirement was intended to apply only in the case of former testimony, reasoning that former testimony "is intended solely to replace live testimony." (State's Brief at 10) However, such reasoning overlooks the fact that under the procedure advocated by Respondent, hearsay testimony would be substituted for the live testimony of the child witness. For this very reason, the admission of the absent declarant's out-of-court statements in this case is analogous not only to the use of former testimony, but the use of closed-circuit testimony as well. *See Maryland v. Craig*, 111 L.Ed.2d 686

(applying unavailability requirement to the use of closed-circuit testimony in lieu of the child complainant's live testimony at trial).

Respondent reasons that unlike former testimony, virtually all other admissible hearsay "has irreplaceable probative value *independent of whatever testimony the declarant may later give at trial.*" (State's Brief at 10; emphasis added) However, such reasoning overlooks the fact that in this case *the declarant did not later testify at trial.* Therefore, regardless of whatever probative value the hearsay may have had to the prosecution's case against the accused, the fact remains that the hearsay was also used to replace the declarant's live testimony.

Respondent concludes this evidentiary analysis by suggesting that the unavailability requirement offers no significant benefit because it "never serves to actually exclude evidence." (State's Brief at 19) However, unlike the hearsay rule, the purpose of the Confrontation Clause is not to exclude evidence, but rather to guarantee the defendant an adversary proceeding. The unavailability requirement implements this guarantee by ensuring that the accused will be given the opportunity to confront his accuser, if at all possible.

B. Respondent's Assumptions Regarding the Reliability of Child Hearsay Are Suspect.

Respondent's argument is premised on the assumption that child hearsay, when admitted under a recognized exception to the hearsay rule, is inherently reliable and absolutely trustworthy. This premise is suspect for several reasons.

Recent research has shown how easy it is for youngsters to stray from the truth. The young child is more vulnerable to suggestion than an adult and more likely to confuse memory of fact with memory of fantasy. Christensen, *The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews*, 62

Wash.L.Rev. 705, 708-11 (1987). Cautioning that the problem of suggestiveness by an authority figure "should not be underestimated," one commentator has explained that:

> A child's complaint of sexual abuse might have resulted from a desire to please, from fear, or from uncritical acceptance of what the child thinks the authority figure believes has happened. Very young children especially might over time accept the suggested event as true and recall it as if it had really occurred.
>
> Graham, *The Confrontation Clause, the Hearsay Rule, and Child Abuse Prosecutions: The State of the Relationship*, 72 Minn.L.Rev. 523 at n.39 (1988).

Furthermore, child hearsay is not necessarily rendered trustworthy by the mere fact that it falls within a recognized exception to the hearsay rule. The instant case is illustrative.

Hearsay testimony in this case was admitted against the accused pursuant to the spontaneous declaration or excited utterance exception to the hearsay rule. It has been recognized that "[e]xcited utterances vary tremendously in their trustworthiness." Binder, *Hearsay Handbook*, § 6.08 at 80 (1975). In fact, although spontaneous declarations are considered reliable, it has been noted that the entire basis for the exception is subject to question:

> While psychologists would probably concede that excitement minimizes the possibility of reflective self-interest influencing the declarant's statements, they have questioned whether this might be outweighed by the distorting effect of shock and excitement upon the declarant's observation and judgment.
>
> *Hearsay Handbook*, § 297 at 855.

Nevertheless, even assuming the reliaibility of "spontaneous" statements that are "made nearly simultaneously

with the relevant event" (Brief of Solicitor General at 13), the rationale underlying the exception is certainly inapplicable to the hearsay testimony of the police officer that was admitted against the accused in this case. The police officer interviewed the child approximately 45 minutes after the relevant event. (J.A. 34) After putting the child at ease by talking about cartoons, the officer elicited the child's version of the incident through the use of leading questions. (Vol. VI, R. 110-12)

In light of the foregoing circumstances, it is clear that the child was not "excited" when she responded to the police officer's questions, the child's answers to the leading questions cannot fairly be characterized as "spontaneous," and it cannot be said that the interview was "simultaneous" with the relevant event. Nevertheless, the Illinois Appellate Court held that the child's statements were spontaneous declarations, reasoning that "[t]he trial court has considerable discretion in determining whether a statement is admissible as a spontaneous declaration, and its decision will not be reversed absent an abuse of that discretion." (J.A. 36)

The Illinois Appellate Court also upheld the admission of statements the child made to medical personnel, pursuant to an admittedly "liberal" interpretation of the medical treatment exception. (J.A. 38) The rationale for this exception is that a patient's selfish interest in receiving appropriate treatment guarantees the trustworthiness of the statement. It is far from clear, however, that the five-year-old child in this case recognized a selfish interest related to treatment. *See State v. Robinson*, 153 Ariz. 191, 199, 735 P.2d 801 (1987) (recognizing that young children do not always grasp the relationship between their statements and treatment). In fact, the record reveals that the child advised the medical personnel that she was not injured; the examination revealed "no tenderness, no soreness of any kind" (Vol. VI, R. 57); and the examining physician testified that all his findings were "negative." (Vol. VI, R. 57)

Furthermore, although the hearsay was admitted under the medical treatment exception, the statements did not pertain to medical treatment at all. Rather, the hearsay testimony merely reiterated the child's version of the incident. While acknowledging that the hearsay related to the "details of the alleged offense" rather than "presently existing bodily condition," the Illinois Appellate Court concluded that:

> [S]ection 115-13 [statutory hearsay exception] was designed, in part, to sever the artificial restraints heretofore imposed by case law on the ability of a physician to testify about what his or her patient told the physician for purposes of medical diagnosis or treatment.
>
> (J.A. 39)

The Illinois Appellate Court's "liberal" analysis in this case is illustrative of the fact that "the hearsay rule is applied more liberally than it is written" (Lampert & Saltzburg, *A Modern Approach to Evidence*, 519 (2d ed. 1982)), especially in child abuse cases. *See State v. Myatt*, 237 Kan. 17, 23, 697 P.2d 836, 842 (1985) (noting that courts have "tended to stretch existing hearsay exceptions" in child abuse cases). For example, in *Goldade v. State*, 674 P.2d 721, 725 (Wyo. 1983), the court admitted hearsay statements against the defendant in a child abuse prosecution, stating:

> If the goal of our court were simply to pursue the common-law tradition of *stare decisis*, then the cited authorities must be recognized as supporting the position of the appellant [to exclude the statement]. In this instance, however, the function of the court must be to pursue the transcendent goal of addressing the most pernicious social ailment which afflicts our society, family abuse, and more specifically, child abuse.

Significantly, the liberal application of hearsay exemptions in child abuse prosecutions eviscerates the traditional rationale for exempting the out-of-court statements

from the hearsay rule. Under these circumstances, a judicial determination that an out-of-court statement falls within an exception to the hearsay rule is no guarantee that the statement is either reliable, trustworthy, or accurate.

C. Respondent Overstates the Burdens Associated with the Unavailability Requirement.

Respondent argues that the unavailability requirement imposes "significant burdens on the prosecution and the criminal justice system." (State's Brief at 18) However, the burdens referred to by Respondent are either overstated or non-existent.

1. *The Unavailability Requirement Is Perfectly Compatible with the Federal Rules of Evidence.*

Respondent argues that the unavailability requirement renders "all of the federal and state hearsay exceptions, as well as their common-law antecedents," unconstitutional. (State's Brief at 27) However, this concern is unwarranted since the Confrontation Clause and the Federal Rules of Evidence are perfectly compatible.

The introductory wording of Federal Rule of Evidence 803 does not state that an exception listed therein is admissible, but merely that it is "not excluded by the hearsay rule." The Advisory Committee's Note explains:

> In recognition of the separateness of the confrontation clause and the hearsay rule, and to avoid inviting collisions between them or between the hearsay rule and other exclusionary principles, the exceptions set forth in Rules 803 and 804 are stated in terms of exemption from the general exclusionary mandate of the hearsay rule, rather than in positive terms of admissibility.
>
> Fed.R.Evid., art. VIII, Advisory Committee Note.

Accordingly, the Federal Rules of Evidence specifically recognize that "*the impact of the* [*confrontation*] *clause clearly extends beyond the confines of the hearsay rule.*" Fed.R.Evid., art. VIII, Advisory Committee Note; emphasis added.

The unavailability doctrine is compatible with state and common law hearsay exceptions as well. The criminal justice system recognizes the separateness of the Confrontation Clause and the hearsay rule. Unlike civil litigation, the procedure for admitting hearsay assertions in a criminal prosecution involves a two-step analysis. First, it must be asked if the assertion comes within an exception to the hearsay rule. If the answer is yes, then it must be determined whether the admission of that assertion violates the defendant's constitutional right to confront the witnesses against him. *Hearsay Handbook*, § 6.06 at 78.

Respondent's argument overlooks the fact that exceptions to the hearsay rule, whether statutory or common law, normally encompass both civil and criminal proceedings. Thus, a two-step inquiry is necessary in criminal proceedings to ensure that a defendant's constitutional rights are protected.

2. *The Unavailability Requirement Does Not Apply to Every Hearsay Exception.*

Respondent argues that the application of the unavailability requirement to "all of the federal and state hearsay exceptions . . . would place considerable burdens on the prosecution and the criminal justice system." (State's Brief at 27) However, the unavailability requirement does not apply to *all* hearsay exceptions.

In *Ohio v. Roberts*, 448 U.S. 56, 65 n.7 (1980), the Court held that unavailability is not required where the "utility of confrontation" is remote. Accordingly, the unavailability requirement is not applicable to many of the exceptions recognized by Federal Rule of Evidence 803, *e.g.*, business records, market reports, learned treatises, and other regularly maintained forms of evidence.

Given the nature of the hearsay offered under these exceptions, the utility of trial confrontation is likely to be remote.[1]

In fact, this is one reason that co-conspirator statements were exempted from the unavailability requirement in *United States v. Inadi*, 475 U.S. 387 (1985). The Court concluded that the utility of confrontation was remote since the co-conspirator declarant was considered so unimportant that neither side had subpoenaed him.

The same cannot be said about the prosecution's complaining witness in the present case who was the only witness to the alleged crime and whose out-of-court statements constituted the bulk of the prosecution's case against the accused.

3. The Unavailability Rule Does Not Impose a Significant Burden on the Appellate Courts Which Already Deal with the Unavailability Requirement on a Regular Basis.

Respondent argues that the unavailability requirement places a substantial burden on the appellate courts. (State's Brief at 21) However, the appellate courts, and trial courts as well, already deal with the unavailability requirement on a regular basis. For instance, evidence law already imposes an unavailability requirement for a number of hearsay exceptions. *See* Fed.R.Evid. 803. Moreover, child hearsay statutes in many states, including Illinois (Ill.Rev.Stat., 1987, Ch. 383, § 115-10), impose unavailability requirements. *See* Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 Harv.L.Rev. 806, 812 (1985)

[1] It has been suggested that the unavailability requirement was intended to apply to the first four exceptions (*e.g.*, present sentence impression, excited utterance, existing mental, physical, or emotional condition, and statements made for medical treatment), as well as the residual exception. Fed.R.Evid. 803(1)-(4), (24). Kirkpatrick, *Confrontation & Hearsay: Exemptions from the Constitutional Unavailability Requirement*, 70 Minn.L.Rev. 655 n.132 (1986).

(citing statutes). Under these circumstances, the constitutional unavailability requirement causes little additional work.

4. The Burden on the Prosecution to Identify, Locate, and Produce Its Complaining Witness Is Not Insuperable.

This Court has held the application of the unavailability rule to co-conspirator hearsay would impose a significant burden by requiring the prosecution "to identify with specificity each declarant, locate those declarants, and then endeavor to ensure their continuing availability for trial." *United States v. Inadi*, 475 U.S. at 399. Since co-conspirators are often incarcerated, the requirement of producing them at trial burdens prison officials and creates the risk of escape.

Obviously, the foregoing reasoning has limited application here. The prosecution should have little difficulty identifying and locating its own complaining witness.

Nevertheless, Respondent argues that the prosecution should not be burdened with ensuring the complainant's continuing availability for trial, reasoning that the child's emotional condition may prevent her from testifying. (State's Brief at 21) This reasoning is obviously flawed since if the child is incapable of testifying, she need not be produced as a witness. As this Court has stated, "the prosecution must *either produce or demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant." *Idaho v. Wright*, 111 L.Ed.2d at 651-52, quoting *Ohio v. Roberts*, 448 U.S. at 65-66 (emphasis added).

D. Respondent's Attempt to Shift the Burden of Production to the Defendant Violates the Sixth Amendment and Undermines the Truth-Seeking Process.

Since the proponent of evidence carries the burden of "establishing [the] predicate" for its introduction, the

burden is on the prosecution to either "produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." *Ohio v. Roberts*, 448 U.S. at 75. Respondent argues that this burden should be shifted to the defense, reasoning that the defendant should be required to subpoena the complaining witness and obtain her testimony under the Compulsory Process Clause. (State's Brief at 19) However, Respondent fails to explain how this procedure would further "the state's interest in preventing trauma to child witnesses in such cases . . ." (State's Brief at 24) Moreover, Respondent's proposal violates the Sixth Amendment and would subvert the truth-seeking process.

1. *Respondent Confuses the Compulsory Process Clause with the Confrontation Clause.*

Respondent's reasoning erroneously equates the right of confrontation with the right to compulsory process. The two are not the same. The Sixth Amendment guarantees the accused two distinct rights: confrontation *and* compulsory process. The defendant is guaranteed "compulsory process *for obtaining witnesses in his favor.*" The defendant is also given the right *"to be confronted with the witnesses against him."* Thus, Respondent's attempt to merge the two clauses sets the Sixth Amendment into conflict with itself.

Respondent points to *Inadi* where this Court held that the "defendant himself can call and cross-examine" his co-conspirator. *United States v. Inadi*, 475 U.S. at 399. However, *Inadi*'s logic is inapplicable here because the relationship between the accused and his accuser is entirely different from the relationship between co-conspirators.

By definition, statements admitted under the co-conspirator exception were made while the conspiracy was in progress, at a time when the co-conspirator was a cohort of the defendant. Accordingly, an absent co-

conspirator cannot be considered a "witness against the accused" simply because co-conspiratory hearsay is admitted at trial.

Unlike the co-conspirator, however, the complainant in a criminal case is, by definition, a witness against the accused.[2] Unlike co-conspirator hearsay, the complainant's out-of-court statements are accusatory in nature.[3] Thus, unlike the co-conspirator, it can hardly be said that the prosecution's complaining witness is a witness favorable to the defendant within the meaning of the Confrontation Clause, especially in the present case where the complainant's out-of-court accusations constituted the bulk of the evidence against the accused.

2. *Respondent's Burden-Shifting Proposal Violates the Sixth Amendment by Subverting the Defendant's Right to the Orderly Introduction of Evidence.*

The right to the "orderly introduction of evidence" is implicit in the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 818 (1975). Respondent's burden-shifting proposal subverts this constitutional right by allowing the prosecution to substitute belated for timely cross-examination. The proposed procedure allows the prosecution to introduce the complainant's testimony via hearsay witnesses, while requiring the defendant to wait until his case-in-chief to cross-examine the declarant.

It has been recognized that the right to cross-examine a prosecution's witness immediately following the conclu-

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[2] *"Complainant* . . . one who instigates prosecution or who prefers accusation against suspected person." Black's Law Dictionary (5th ed. 1979).

[3] It has been suggested that the phrase "witness against" a defendant be limited to those witnesses who testify in court on behalf of the prosecution or whose out-of-court statements are "accusatory" in nature. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse: The State of the Relationship*, 72 Minn.L.Rev. 523, 585 (1988).

sion of his direct examination is at the heart of the Confrontation Clause:

> The gross order-of-proof in American criminal procedure is dictated partly by tradition and partly by constitutional compulsion. Thus, tradition provides that as between two sides, the prosecution presents its case first and the defendant presents his case second. In addition, however the sixth amendment entitles a defendant to interrupt the prosecution's case-in-chief by intervening to elicit evidence in his defense by means of cross-examination. . . . Indeed, *the right of a defendant to interrupt the state's presentation of evidence by cross-examining prosecution witnesses is at the core of the sixth amendment right of confrontation.*
>
> Westen, *Order of Proof: An Accused's Right to Control the Timing and Sequence of Evidence in His Defense*, 66 Calif.L.Rev. 934, 981-83 (1978), (emphasis added).

Accordingly, it has been noted that "only a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of the right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *United States v. Inadi*, 475 U.S. at 410 (Marshall, J., dissenting), quoting *New York Life Ins. Co. v. Taylor*, 79 App.D.C. 66, 74, 147 F.2d 297, 305 (1945).

Significantly, this Court has never hinted, even slightly, that the Sixth Amendment permits the prosecution to introduce an *ex parte* affidavit or a video statement of the complaining witness merely because the accused may later call and examine the complainant during his case-in-chief. There is no valid reason to permit such a burden-shifting procedure when the prosecution relies upon the complainant's unsworn verbal hearsay rather than written affidavits or closed-circuit testimony.

3. *Respondent's Burden-Shifting Proposal Subverts the Truth-Seeking Process.*

In *Inadi*, the Court concluded that the application of the unavailability requirement to co-conspirator hearsay would add little to the "truth-determining process," since "only those declarants that neither side believes will be particularly helpful will not have been subpoenaed as witnesses." *United States v. Inadi*, 475 U.S. *at* 396-97. Respondent attempts to extend *Inadi*'s logic to this case by noting that the prosecutor might decide "not to call" the complaining witness. (State's Brief at 19)

However, Respondent's logic again overlooks the critical distinction between co-conspirators and complaining witnesses. Since the co-conspirator is often facing indictment himself, he "has little incentive to aid the prosecution" and will have a motive to testify falsely. *United States v. Inadi*, 475 U.S. at 396. Under those circumstances, the unavailability requirement adds little to the truth-seeking process.

The same cannot be said when the prosecution declines to call the only witness to the alleged crime, simply because the prosecutor determines that the complainant's testimony will not be "particularly helpful." Absent the unavailability requirement, the prosecution can build a case on hearsay without encountering any of the risks of calling the complaining witness to the stand. Such a procedure subverts the truth-seeking process by allowing the prosecution to rely on witnesses who know nothing except what the absent declarant said, thereby eliminating the incentive for the prosecutor to make the fullest presentation of evidence. As one commentator has noted:

> [T]he purpose of the [unavailability] rule is to force the prosecutor to put forward the best case he has against the defendant. There is something innately unfair and reminiscent of trial by affidavit in a process that allows the prosecutor to build a case with hearsay, while the defendant is forced to scramble

about and exhaust his own, often scarce resources to attempt to produce the declarants.

Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv.L.Rev. 1378, 1403 (1972).

Certainly, the truth-determining process is better served by requiring the prosecution to present all, not just part, of the relevant evidence.

If the prosecution's proposal is implemented, the jury may often be deprived of the most significant evidence in the case: the testimony of the only eyewitness to the crime. For instance, after interviewing the complaining witness the prosecutor might conclude that the complainant's testimony could actually damage the prosecution's case against the accused. Accordingly, the prosecutor may elect not to call the complainant to the stand, thereby shifting the burden of production to the defendant. However, in criminal cases, especially child abuse prosecutions, the defense often has not had the opportunity to interview the complaining witness prior to trial. Time-worn admonitions tell the advocate not to call someone without knowing what she will say. Moreover, the defense risks angering the jury by calling the child, especially under circumstances like the present case where the complainant appears before the jury emotionally distraught.

In such a situation, the complaining witness might not be called to the stand. Common sense, however, dictates that the testimony of the only eyewitness would have aided the jury and advanced the truth-seeking process.

E. The Prosecution Failed to Establish that the Complaining Witness Was Unavailable to Testify at Trial.

The defendant agrees with Respondent's premise that "a child witness who is physically present is nevertheless 'unavailable' for confrontation purposes if psychologically able to testify." (State's Brief at 29) However, the defendant challenges Respondent's conclusion that a sufficient showing of unavailability was made in this case where "S.G. was *apparently* so emotionally distraught by the time she was called to testify that she could not take the stand . . ." (State's Brief at 27; emphasis added).

This Court has held that the requisite finding of unavailability must be "a case-specific one," based upon evidence presented at a hearing. *Maryland v. Craig*, 111 L.Ed.2d at 685. The trial court must find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. *Maryland v. Craig*, 111 L.Ed.2d at 685. Finally, the trial court must find that "the emotional distress suffered by the child is more than *de minimus*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" *Maryland v. Craig*, 111 L.Ed.2d at 685. Accordingly, in *Coy v. Iowa*, 487 U.S. 1012 (1988), this Court held that the right of face-to-face confrontation could certainly not be denied where no individualized findings had been made that the witness needed special protection.

In this case, the record does not reveal whether the "*apparent*" distress suffered by the child was the result of reluctance to testify, nervousness, excitement, the courtroom generally, or the presence of the defendant. Furthermore, there was no hearing on the issue of unavailability and there were no findings by the trial court.

Finally, Respondent suggests that if the record fails to establish that S.G. was unavailable to testify, the prosecution should be given an opportunity to make such a showing on remand before petitioner is granted a new trial.[4] (State's Brief at 30) However, Respondent's

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[4] Respondent fails to explain how such a showing could be made. The defendant's trial occurred over three years ago. Even if it can be shown that S.G. is unavailable to testify now, it would not necessarily mean that she would have been unavailable to testify at trial.

argument overlooks the fact that the prosecution not only had the opportunity, but the obligation, to establish S.G.'s unavailability *prior* to the introduction of the hearsay testimony. *Ohio v. Roberts*, 448 U.S. at 65.

Significantly, in light of the age of the child and nature of the proceedings, it is not unreasonable to suggest that the prosecutor should have known that S.G.'s debut as a witness could be an emotionally trying experience.[5] Yet, the prosecutor did not seek a pretrial ruling concerning unavailability, nor did he move for the closed-circuit viewing of the child's testimony pursuant to the applicable provisions of the Illinois Code of Criminal Procedure (Ill.Rev.Stat., 1987, Ch. 38, § 106A-3).

In fact, the prosecutor did not attempt to call S.G. to the witness stand until *after* her out-of-court statements had already been introduced through the testimony of five different witnesses. By waiting to call S.G. until the conclusion of his case-in-chief, the prosecutor may have been hoping to gain some strategic advantage. However, since the Confrontation Clause requires a showing of unavailability as a *precondition* to the admission of hearsay statements by a non-testifying declarant, the prosecutor risked inducing a mistrial if the complainant did not testify.

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[5] In fact, prior to calling S.G. to the stand, the prosecutor moved for the exclusion of spectators, recognizing that it "is incredibly difficult for anyone even an adult to testify about acts such as are alleged here and for the child this is doubly more so." (J.A. 7).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petitioner's Brief, it is respectfully requested that this Honorable Court reverse the judgment of the Illinois Appellate Court and remand this cause for a new trial.

Respectfully submitted,

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